Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term 1976

No. 76-369

WILLIAM E. WELLS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WILLIAM E. WELLS,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

William E. Wells prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered July 9, 1976, in a proceeding entitled: Case No. 75-1779, United States of America, Plaintiff-Appellee v. William E. Wells, Defendant-Appellant, Appeal from the United States District Court for the Eastern District of Kentucky, at Covington.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is printed in the Appendix hereto. It has not yet been officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered July 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

I-a

Did the District Court err in permitting the prosecutor to read into the record under guise of cross-examination a word-for-word series of incriminating statements from a non-authenticated and unadmitted transcript of taped conversations when the Court had previously refused to receive the taped conversations themselves?

I-b

Did the District Court err in permitting the prosecutor in argument to the jury to again quote from the same transcript and further err in refusing a motion to instruct the jury that the purported "quotations" were from a non-authenticated and unadmitted document?

II

Did the District Court err in permitting testimony of a transaction before the time-frame of the indictment from a witness not mentioned in the indictment, from a witness who had not given such testimony in her appearance before the grand jury which issued the indictment, and whose testimony was first restricted to a perjury count and then used on a conspiracy count, although *that* count, Count XII, specifically referred in its charge to transactions with a named person other than this witness?

STATEMENT OF FACTS

For the purpose of this Petition and in support of the questions raised herein we will quote freely and directly from the fact-summary made by the Sixth Circuit in its opinion.

As to the overall facts: "This case involves charges of conspiracy, extortion and perjury against three Newport, Kentucky Police Officers, Appellants Donald D. Faulkner, William E. Wells and Jerry McClanahan, the police officers, were indicted by the grand jury in the District Court on fourteen counts. All three Appellants were indicted on one count of conspiracy to violate the Hobbs Anti-Racketeering Act, 18 U.S.C. § 1951. In addition, they were charged individually with ten substantive violations of the Hobbs Act (Counts 2-4 charged Faulkner; 5-8 charged Wells; and 9-11 charged McClanahan). Finally, Wells (in Count 12) and McClanahan (in Counts 13-14) were charged with making false statements to the grand jury during its investigation of this case, a violation of 18 U.S.C. § 1623."

"The trial of the case against the defendants lasted nearly one month. Essentially it was the Government's position that these three police officers had conspired to and did obtain 'protection money' from a well-known nightclub in Newport, Kentucky, named The Brass Ass.' The jury found the defendants guilty on all counts charged against them. They were sentenced to five years imprisonment on each count, the sentences to run concurrently." (Opinion of Sixth Circuit, Page 2)

As to the facts involved in Question I-a and Question I-b of this Petition, namely, the attempted use by the Government of certain conversations between the defendants and Samuel Harris, manager of the nightclub in question,

and the actual use of the transcript of these taped conversations: The Court listened to those tapes *in camera* and held that they could not be introduced into evidence because they were in part unintelligible; however, prior to trial the Government was able to prepare a transcript of the tapes, and counsel for the defendants were provided with that transcript."

"*The Government used the transcript intensively* in cross-examining the defendants and in examining Samuel Harris. *The United States Attorney would read to a defendant a statement from the transcript and would inquire of him whether he had made that statement to Harris.* Later, Harris was put on the stand and testified that the statements had been made by the defendants to him. Wells challenges this procedure; he contends that this was a devious procedure used to get the tapes before the jury after they had been held inadmissible by the trial court." (All above quoted from *Opinion of Sixth Circuit Court,* Page 4. Emphasis added.) It will be noted by this present Court that there was no qualification nor authorization of the transcript used.

As to the damage done by this procedure in its effect on the jury: "Admittedly, the use of the transcript to impeach the testimony of Wells and McClanahan was damaging to these defendants." (Government Brief in the Sixth Circuit, page 21) The language of all parties is vile and its effect revolting, yet the District Attorney repeatedly read it all directly, as is evident in the Appendix hereto in which both the transcript and the District Attorney's direct-quotation readings (including quotation marks) are both set forth.

As to the fact involved in Question II of this Petition: Since the Sixth Circuit in its opinion elected to ignore this question completely (although presented on Brief and

Argument), there is no statement of fact in the opinion on this point. The facts are as follows: Testimony was taken from one Barbara Jenkins, a former employee of The Brass Ass nightclub, regarding alleged payoffs made *by her* to the defendants, although:

(1) Such transactions were not charged in the indictment and, in fact, were placed at a time prior to the time-span of the indictment.

(2) She was not mentioned in the indictment.

(3) She did not present these charges to the grand jury which issued the indictment although she testified before it. Moreover, the Court originally admitted her testimony upon the representation of the United States Attorney that it was to go to the Perjury Charge (Transcript, Vol. 9, Page 619). Later, the Court permitted its use in support of the Conspiracy Count, Count XII, against Petitioner Wells (Transcript, Vol. 9, Page 627). This, despite the fact that Count XII of the indictment, as this Court can see in the Appendix hereto, in Paragraph 4 specifically confines the charge to transactions with Samuel Harris.

DECISION IN THE COURT OF APPEALS

The Sixth Circuit Court of Appeals by order dated July 9, 1976, affirmed the judgment of the District Court on questions raised herein in Questions I-a and Question I-b, ignored the question raised herein in Question II, and dismissed a Petition for Rehearing on August 13, 1976.

In regard to Questions I-a and I-b raised in this Petition on behalf of William E. Wells, the Sixth Circuit found:

(1) "The tapes were ruled inadmissible at the request of the defendants because they were in part unintelligible and not because they were irrlevant to the case." (Pages 4 and 5)

(2) "The United States Attorney used the transcripts of the tapes to Harris's (Government witness) recollection. Documents need not be admitted or admissible in evidence in order to be used to refresh the recollection of a witness." (Page 5)

(3) "The determination of whether the transcript of the tapes should be used to refreshing the witness's recollection is within the discretion of the District Judge." (Page 5)

(4) "Because Harris had testified as to the substance of the transactions he had with each defendant, his testimony occurring prior to the time that the United States Attorney refreshed his recollection as to the exact language by reading from the transcript of the tapes, we find no abuse of discretion in permitting Harris's recollection to be refreshed in this manner." (Page 5)

This decision is challenged herein point by point as follows:

(1) Where *tapes* are involved at all, it is necessary to qualify them in accordance with the 7-step requirements of *United States* v. *McMillan,* 508 Fed.Rep. 2, 101 (8th Cir., Dec. 31, 1974). Where *transcripts* are used, proper conditions are indicated in this same case, as will be presented herein under Argument I-a.

(2) The transcripts were used beyond "refreshing Harris's memory." They were used on the defendants who in no way fitted into the role of having their memories

refreshed by "documents" or notes of their making. The tapes were not in the control of the defendants. To them they were a trap of which they were unaware, a trap laid for them by a Government witness, a trap into which they were led by a Government attorney.

(3) The transcript cannot even be said to have been used properly in regard to Harris since there was no need to "refresh memory" in his case since, in the Circuit Court's own words, "Harris had testified as to the substance of the transactions he had with each defendant, his testimony occurring prior to the time the United States Attorney refreshed his recollection . . .".

REASONS FOR GRANTING WRIT

Petitioner states that he has been deprived of his constitutional right to a fair and impartial trial because of the admission of improper evidence.

Petitioner further states that because of the foregoing he will be deprived of his liberty without due process of law, all in violation of the Fifth Amendment to the United States Constitution.

Petitioner finally states that the ruling of the Sixth Circuit herein is in direct contradiction to the requirements for the use of transcripts as set forth by the Eighth Circuit in the case of *United States* v. *McMillan,* 508 Fed.Rep. 2, 101 (Dec. 31, 1974), thus furnishing this Court with a conflict in jurisdictional decisions.

ARGUMENT

I-a

DID THE DISTRICT COURT ERR IN PERMITTING THE PROSECUTOR TO READ INTO THE RECORD UNDER GUISE OF CROSS-EXAMINATION A WORD-FOR-WORD SERIES OF INCRIMINATING STATEMENTS FROM A NON-AUTHENTICATED AND UNADMITTED TRANSCRIPT OF TAPED CONVERSATIONS WHEN THE COURT HAD PREVIOUSLY REFUSED TO RECEIVE THE TAPED CONVERSATIONS THEMSELVES?

To put first things first: Transcriptions of tapes cannot exist unless the tapes from which they are transcribed exist. Legal existence is presentation and acceptance in Court and tapes cannot be properly presented and accepted unless some qualifications are established, such as in the *McMillan* case. If tapes cannot acquire acceptance without qualification neither can the transcript of tapes.

Where tapes are held to be improper for jury presentation it is neither good logic nor good law to contend that the contents of these tapes can be made proper by a prosecutor culling through an unqualified "transcript" and selecting certain specimens to present to the jury. That is precisely what he does when he quotes verbatim and totally under guise of refreshing the memory of a Government witness or impeaching testimony of a defendant by this manipulation of the "transcript" whereby he gets into the record through unqualified transcripts of tapes what he could not do with the unqualified tapes themselves.

Moreover, the Government witness is not having his memory *refreshed* by these tapes when: (1) He produced them himself, carried them on his person and is not in disagreement with them. (2) He has already "testified as to the substance of the transactions he had with each defendant, his testimony occurring prior to the time that the United States Attorney refreshed his recollection —." (Opinion, Sixth Circuit, Page 5) (3) He is read the complete and total statement the prosecutor wishes him to say. This is not "evoking recall" but telling the witness completely what to say in preselected language.

Nor is a defendant properly impeached by these transcripts, which were never qualified, taken from tapes which were never of record. The person who made and provided them is their only sponsor — a confessed briber, a veteran criminal, and chief prosecuting witness — hostile Samuel Harris.

The ruling of the Sixth Circuit is contrary to the ruling of the Eighth Circuit in a recent case, *U.S.* v. *McMillan,* 8th Circuit, Dec. 31, 1974, 508 Fed. Reporter 2, 101. There the general and specific means of using tapes and transcripts is well set out. The court says "The primary issue in this appeal is whether the District Judge erred in admitting certain tape recordings and transcripts into evidence. In this case the appellate court concluded that the agent who made the recordings heard the voice at all times while he was recording (over the telephone) that the conversation was accurate and immediately after the telephone calls the tape was replayed by the agent in the presence of the person who was recorded to verify the conversations, and that the instruments were operating correctly. Page 4 of the opinion sets forth what is required for a foundation for use of a tape —

Those requirements include a showing:

(1) That the recording device was capable of taking the conversation now offered in evidence.

(2) That the operator of the device was competent to operate the device.

(3) That the recording is authentic and correct.

(4) That changes, additions or deletions have not been made in the recording.

(5) That the recording has been preserved in a manner that is shown to the court.

(6) That the speakers are identified.

(7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

None of these Eighth Circuit requirements were met herein, nor did the Sixth Circuit, in declaring such usage of transcript a matter of judicial discretion, agree with the Eighth Circuit which said: "The best evidence of the conversation is the tape itself; the transcript should normally be used only after the defendant has had an opportunity to verify its accuracy and then only to assist the jury as it listens to the tape. If accuracy remains an issue, a foundation may first be laid by having the person who prepared the transcripts testify that he has listened to the recordings and accurately transcribed their contents. The need for transcripts is generally caused by two circumstances, inaudibility of portions of the tape under the circumstances in which it will be replayed or the need to identify the speakers.

Transcripts should not ordinarily be read to the jury or given independent weight. The trial judge should carefully instruct the jury that differences in meaning may be

caused by such factors as the inflection in a speaker's voice or inaccuracies in the transcript and that they should, therefore, rely on what they hear rather than on what they read when there is a difference. Transcripts should not ordinarily be admitted into evidence unless both sides stipulate to their accuracy and agree to their use as evidence.

The *McMillan* case cites every landmark case in use of tapes and transcripts. For example in *U.S.* v. *McKeever,* 169 Fed. Supp. 426, one of the early cases, and also a Hobbs Act violation, the attempt was made to use the content of a tape recording by asking the witness *if he recalled the conversation.* This was not permitted, unless the foundation standards were used, being six in number, as approved and restated in the *McMillan* case with a 7th foundation peg. *Monroe* v. *U.S.,* 234 Fed. Rep.2 49, used only 4 standards for foundation, while tapes and transcripts were permitted to be read where a proper foundation was laid in *U.S.* v. *Jacobs,* 451 Fed. Rep.2 530.

In *U.S.* v. *Bryant,* 480 Fed. Rep.2 785, transcript of a tape was admitted where portions of the tape heard *in camera* were inaudible, but the tape was played and the court gave cautionary instructions that jury was to rely on what they heard from the tape. The court in that case at pg. 791 instructed:

> "It is the tape recorder that counts, not the transcript, the transcript was given you in order to understand . . . the tape recorder. I will ask you to rely upon what you actually heard from the tape recorder. If you haven't heard it from the recorder, then disregard the transcript . . . . As I said before, the transcript was given you only to assist in hearing the actual tape."

Contrast the care the court took in the *Bryant* case with this present case in which the court refused to consider any cautionary instruction and permitted the prosecutor to read the transcript to the jury as testimony.

I-b

DID THE DISTRICT COURT ERR IN PERMITTING THE PROSECUTOR IN ARGUMENT TO THE JURY TO AGAIN QUOTE FROM THE SAME TRANSCRIPT AND FURTHER ERR IN REFUSING A MOTION TO INSTRUCT THE JURY THAT THE PURPORTED "QUOTATIONS" WERE FROM A NON-AUTHENTICATED AND UNADMITTED DOCUMENT?

It was bad enough in cross-examination to use the full text of a transcript of inaudible tapes, all without authentication of its contents, and to have it read word for word to a hostile Government witness, and call it memoranda to refresh memory. It was even more grevious to thereafter allow the Government to again read the word for word content on closing argument. All of this was without one single cautionary instruction from the trial judge, and over objection.

Finally, there was a request for instructions made after these statements were incorporated into argument by the United States Attorney to make clear their import. It was refused. The requested instruction read:

> In your deliberations, you cannot consider the questions read to Sam Harris from a written text, as actual conversation of the defendant Wells with Sam Harris,

> because it has not been introduced into evidence in this case.
>
> This instruction is requested at this time, because over the continuing objection of counsel for Wells, the government has continued to use it both during the case in chief and during final argument, attempting to get into the record text of tape material that was never introduced into evidence, much less has it ever been identified as to source or origin of text or any other qualifying factor.

This Court is therefore asked to examine two areas of improper official procedure.

(1) Not only did the District Court fail in its duty but,

(2) The United States Attorney went far beyond the limits of what constitutes a fair trial to this Petitioner. In fact, it amounts to overkill, a procedure denounced by the same Sixth Circuit which overlooked such procedure here. In *United States* v. *Leon* (6th Cir., April 2, 1976), not yet reported, the Court reversed a strong Government case for such overkill procedure. In Section VI of the Opinion it cites the key decision of this Supreme Court, *Berger* v. *United States*, 295 U.S. 78, 88, quoting this Court:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. *He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows,*

> *he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."*

This Court further said in the *Berger* case:

> *"This principle forbids the government's injection of improper or prejudicial material that deprives an accused of his right to a fair trial.* For example, the government attorney may not express to the jury his personal knowledge of the guilt of the accused *or bring to its attention purported facts that are not in evidence and are prejudicial."*

We submit that the word for word reading was prejudicial, that the purported facts imparted to the jury were not legitimately in evidence, that the closing remarks were not isolated but were deliberate, not accidental, and that the government had more than enough to go to the jury, without using a word for word "refreshment." Moreover, we invite this Court to read the vile language of the transcript and judge the prejudicial effect of its repetition.

II

DID THE DISTRICT COURT ERR IN PERMITTING TESTIMONY OF A TRANSACTION BEFORE THE TIME-FRAME OF THE INDICTMENT FROM A WITNESS NOT MENTIONED IN THE INDICTMENT, FROM A WITNESS WHO HAD NOT GIVEN SUCH TESTIMONY IN HER APPEARANCE BEFORE THE GRAND JURY WHICH ISSUED THE INDICTMENT, AND WHOSE TESTIMONY WAS FIRST RESTRICTED TO A PERJURY COUNT AND THEN USED ON A CONSPIRACY COUNT, ALTHOUGH THAT COUNT, COUNT XII, SPECIFICALLY REFERRED IN ITS CHARGE TO TRANSACTIONS WITH A NAMED PERSON OTHER THAN THIS WITNESS?

Counsel for defendant Wells in the Trial Court objected to the introduction of testimony of one Barbara Jenkins, a former employee of The Brass Ass nightclub regarding alleged payments made by her to Wells. "There is nothing in these indictments to indicate that these payments were made to the defendant." (Trans. Vol. 8, p. 614). The District Court overruled this objection (Tr. Vol. 9, p. 617) although it developed that the money in question was alleged to have been passed on behalf of another nightclub, the proposed Barbs Doll House. The Court admitted this as going to the *perjury* charge since there was included in the indictment an inserted excerpt from Wells' testimony before the grand jury denying acceptance of any gifts from any club. Later, however, this distinction, whereby the testimony was permitted for the

perjury charge, was ignored by the prosecutor with Court approval: In Trans. Vol. 9, p. 677, we find:

> "THE COURT (to the District Attorney): Now if you will identify in your next question just which one of these counts you are talking about I will try to turn to it and see whether or not it will be competent. I can't tell from your statement just what you're going to ask her."
>
> MR. AREHARD: These questions go to the conspiracy, Your Honor."
>
> "THE COURT: All right."

Now the *charge* in Count XII, the conspiracy count, toward which this testimony was thereby directed reads:

> "4. The aforementioned testimony of William E. Wells, as he then and there well knew and believed, was not true in that: (1) he had in fact received *gifts of money from Samuel Harris* as an agent and representative of The Brass Ass nightclub as listed in Counts 5, 6, 7 and 8 of this indictment, which are incorporated by reference the same as if written in full herein; (2) he had in fact met and spoken with the said *Samuel Harris* on the premises of The Brass Ass nightclub on at least two occasions during the period between *November 1 to December 31, 1973*; (3) he had in fact exited by the rear door of The Brass Ass nightclub with *Samuel Harris,* received an item from Samuel Harris, and reentered The Brass Ass nightclub on or about the 22nd day of December, 1973." (Emphasis added)

Yet in spite of this specific charge, Barbara Jenkins (who was definitely not Samuel Harris) and in spite of the definite dates charged (which were November 1 to December 31, 1973) was permitted to testify under this Count XII even though the record shows the following:

"THE COURT: Did you see any of that as to any of these defendants in the months of *September, October, November and December, 1973?*"

"THE WITNESS: No." (Emphasis added)

Furthermore the record shows this testimony did not pertain to charge in indictment:

"The Witness: I was in business at the time in the *New Plaza Lounge.*" (A bar not mentioned in the indictment.) "He was there to protect Sam, Sammy Wright's interests or rights, and Mary Dell was making accusation that I was stealing money from them and all this, and that's why I asked 'Red' (Petitioner Wells) for protection, *because I was still operating the New Plaza Lounge.*"

"The Court: I will overrule your objection." (Emphasis added) (Trans., Vol. 8, p. 17, App. 24a)

The totality of the Jenkins testimony was formalized by a written motion filed after her testimony pointing out:

1. If any part of it is to be considered within the purview of USC 18-1951, in any substantive count, there is no support for it. It is fundamental in a Hobbs Act violation that two basic elements be present: a. Interference with interstate commerce, b. extortion. *U.S.* v. *Provenzano,* 334 F. Rep.2 678 *cert. denied.* Further fear is an element that must be generated in the victim, and extortion as the resulting act from the generating fear, and to prove a conspiracy to extort it is necessary to show a plan to instill fear. *U.S.* v. *Carbo,* 314 F. Rep.2 718, *cert. denied.*

2. If any part of the Jenkins testimony is directed to the perjury count, this is error. It is fundamental that evidence used to convict a defendant obtained at a date later than when the indictment was returned, deprives the

defendant of a basic guaranty for which the grand jury was designed to serve. A defendant would be convicted on the basis of facts not found by, nor even presented to, the Grand Jury which indicted him. *Ex parte Bain,* 121 U.S. 1; *U.S.* v. *Morris,* 281 U.S. 619 (622); *Clayett* v. *U.S.,* 197 U.S. 207.

3. Finally the Court should have given cautionary instruction on the acceptance of the Jenkins testimony, after the request by counsel for appellant Wells, in light of the entire record.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be granted to Petitioner herein.

Respectfully submitted,

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APPENDIX

Proceedings in the
United States Court of Appeals
For the Sixth Circuit

CAUSE ARGUED AND SUBMITTED

(December 10, 1975)

Before: WEICK, PECK and LIVELY, Circuit Judges.

This case was argued by B. H. Berg, for William E. Wells, Defendant-Appellant and by James Arehart for the Plaintiff-Appellee and is submitted to the Court.

JUDGMENT

(Decided and Filed July 9, 1976)

Appeal from the United States District Court for the Eastern District of Kentucky at Covington.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

On consideration whereof, it is now ordered and adjudged by this Court that the judgment of said District Court in this cause be and the same is hereby affirmed.

Approved for Entry:

PAUL C. WEICK
United States Circuit Judge

Nos. 75-1778, -1779, -1780

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75-1778

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DONALD D. FAULKNER,
Defendant-Appellant.

No. 75-1779

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WILLIAM E. WELLS,
Defendant-Appellant.

No. 75-1780

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JERRY MCCLANAHAN,
Defendant-Appellant.

APPEAL from United States District Court for the Eastern District of Kentucky, at Covington.

Decided and Filed July 9, 1976.

Before WEICK, PECK and LIVELY, Circuit Judges.

WEICK, Circuit Judge. This case involves charges of conspiracy, extortion and perjury against three Newport, Kentucky police officers. Appellants Donald D. Faulkner, William E. Wells and Jerry McClanahan, the police officers, were indicted by the grand jury in the District Court on fourteen counts. All three appellants were indicted on one count of conspiracy to violate the Hobbs Anti-Racketeering Act, 18 U.S.C. § 1951. In addition, they were charged individually with ten substantive violations of the Hobbs Act (Counts 2-4 charged Faulkner; 5-8 charged Wells; and 9-11 charged McClanahan). Finally, Wells (in Count 12) and McClanahan (in Counts 13-14) were charged with making false statements to the grand jury during its investigation of this case, a violation of 18 U.S.C. § 1623.

The trial of the case against the defendants lasted nearly one month. Essentially it was the Government's position that these three police officers had conspired to and did obtain "protection money" from a well-known nightclub in Newport, Kentucky, named "The Brass Ass." The jury found the defendants guilty on all counts charged against them. They were sentenced to five years imprisonment on each count, the sentences to run concurrently.

The defendants filed separate appeals which were consolidated for oral argument. Pending appeal the defendants have filed in the District Court a motion for a new trial on newly discovered evidence. They also filed a motion to stay this appeal pending the determination of that motion; the motion for a stay pending appeal was denied. The District Court is empowered to hear that motion and need apply to this Court only if it decides to grant the motion during the pendency of this appeal.

I

An important government witness in this case was Samuel Harris, who became manager of the nightclub and assumed control over the books and receipts of the nightclub after Vance Raleigh, the owner of the club, was killed. Harris testified that he had paid protection money in behalf of the nightclub, to the defendants. That testimony was buttressed by a ledger book in which he had recorded the dates and amounts of the various payoffs. Defense counsel were permitted to examine this ledger before the trial.

At the trial Harris testified that he kept the ledger book in his office file cabinet at the nightclub. There was a fire in the nightclub, allegedly caused by arson, while this ledger book was in that file cabinet; the ledger book was water-spotted and singed as a result. Faulkner offered three witnesses who testified that the file drawer in which the ledger book was supposedly kept did not contain the book on the night of the fire.

Faulkner contends that the District Judge erred in refusing to allow Faulkner to have the ledger book chemically tested. At a hearing held to determine whether such testing should be ordered, the alleged chemist offered by the defense testified that he would be able to detect traces of gasoline if the book had been exposed to a gasoline fire. However, because certain circumstances could have prevented the gasoline vapors from permeating the book, an absence of gasoline traces would not establish conclusively that the book was not in the fire. Thus, the District Judge concluded that the testing would not have produced material evidence. We agree.

Competent evidence was presented at the trial in Samuel Harris' testimony that he left the ledger in the file cabinet.

The three witnesses produced by Faulkner testified to the contrary. The issue was thus joined and the factual determination as to which of the witnesses should be believed was within the sole province of the jury. Inconclusive testing (for which no request was made prior to trial) as to the presence of gasoline traces would not have aided the jury in making this determination. As the District Judge stated, in order to use the results of the chemical test it would have been necessary to pile inference upon inference.

In view of the subsequent evidence offered by the Government with respect to the qualifications of the alleged chemist, such testing appears to be all the more pointless. The so-called chemist, "Dr." Papucci, testified that he had a Ph.D. degree in chemistry from Illinois Institute of Technology; the truth was that he had never received any degree from the Institute. He had merely taken six courses there, flunking five. However, "Dr." Papucci did testify at length, and for whatever it was worth, that the ledger could not have been in a fire such as that occurring at the nightclub. Appellant thus received the benefit of the strongest possible testimony from their alleged expert witness.

We find no prejudicial error in the District Court's refusal to allow chemical testing of the ledger.

II

While Samuel Harris was paying off various members of the Newport police force, he was taping those transactions. The Court listened to those tapes *in camera* and held that they could not be introduced into evidence because they were in part unintelligible; however, prior to trial the Government was able to prepare a transcript of

the tapes, and counsel for the defendants were provided with that transcript.

The Government used the transcript intensively in cross-examining the defendants and in examining Samuel Harris. The United States Attorney would read to a defendant a statement from the transcript and would inquire of him whether he had made that statement to Harris. Later, Harris was put on the stand and testified that the statements had been made by the defendants to him. Wells challenges this procedure; he contends that this was a devious procedure used to get the tapes before the jury after they had been held inadmissible by the trial court.

We note first that the tapes were ruled inadmissible at the request of the defendants because they were in part unintelligible and not because they were irrelevant to the cases. The United States Attorney used the transcript of the tapes to refresh Harris' recollection. Documents need not be admitted or admissible in evidence in order to be used to refresh the recollection of a witness. The direct evidence used to impeach the defendants came from Harris who, on redirect examination, testified that he had heard a defendant make each statement which was read to him by the United States Attorney. In addition, on direct examination Harris testified as to the substance of those same transactions.

The determination of whether the transcript of the tapes should be used for the purpose of refreshing the witness' recollection, is within the discretion of the District Judge. *United States* v. *Cranson,* 453 F.2d 123 (4th Cir. 1971), *cert. denied,* 406 U.S. 909 (1972). However, some caution must be exercised to insure that the document is not used to put words into the mouth of the witness. *Esperti* v. *United States,* 406 F.2d 148 (5th Cir.), *cert. denied,* 395 U.S. 938 (1969).

Because Harris had testified as to the substance of the transactions he had with each defendant, his testimony occurring prior to the time that the United States Attorney refreshed his recollection as to the exact language by reading from the transcript of the tapes, we find no abuse of discretion in permitting Harris' recollection to be refreshed in this manner.

III

Appellants contend that the admission of Barbara Jenkins' testimony constituted plain error. Jenkins worked at the nightclub prior to the time that Samuel Harris had become the manager. She testified that during the time period of the conspiracy charged under Count 1 of the indictment Wells approached her to collect $500 of protection money which he claimed was owed by the deceased owner of the nightclub to a group of police officers, and that she made the payment to him.

Count 1 of the indictment charged a conspiracy to obtain money from the nightclub induced by the defendants acting under color of official right in their capacities as police officers. The testimony of Jenkins as to the $500-payment constituted proof of an overt act relating to that conspiracy. Admission of the testimony did not constitute error.

Appellants contend further that the trial judge erred in failing to instruct the jury as to the limited application of Jenkins' testimony; however, they failed to enter any objection to the charge with respect to this matter prior to the time the jury retired when the Court requested objections to be made. Fed. R. Crim. P. 30 provides:

> . . . No party may assign as error any portion of the charge or omission therefrom unless he objects

> thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection . . . .

We have held that objections to the jury instructions must be made at the time of trial unless the charge constituted plain error. In view of the fact that the trial judge clearly and explicitly stated that Jenkins' testimony was admissible against all of the defendants for the purpose of establishing the conspiracy, we are unable to find such plain error in the case at bar. *See United States* v. *Billingsley,* 474 F.2d 63 (6th Cir.), *cert. denied,* 414 U.S. 819 (1973). Jenkins' testimony was admissible also against Wells on the substantive offense.

Finally, Wells asserts that the trial court erred in admitting testimony from Jenkins that she paid him $1,000 on another occasion to purchase police protection against the threats of a hit man who was in Newport.

As a general rule, in jury trials evidence of a criminal defendant's prior misconduct is inadmissible in the prosecution's case in chief to show the accused's bad character or criminal propensity. *United States* v. *Ring,* 513 F.2d 1001 (6th Cir. 1975. However, there are exceptions to this general rule which permit evidence of a defendant's prior misconduct to "show motive, intent, absence of mistake or inadvertence, identity of the offender or a common plan, pattern or scheme." *United States* v. *Ring, supra,* at 1004.

The testimony of Jenkins tended to prove that Wells was acting pursuant to a plan or pattern of extortion which characterized his dealings with the nightclub in his official capacity. We find no error in the admission of Jenkins' testimony.

Although the trial judge did not instruct the jury as to the limited nature of this testimony, appellant waived any right to object because the failure to so instruct did not constitute plain error. Fed. R. Crim. P. 30.

Furthermore, McClanahan and Faulkner were not prejudiced by this failure to instruct as the trial judge explicitly instructed the jury at the time the testimony was being elicited that such testimony was not to be considered against them.

IV

When appellant Faulkner was cross-examining Harris he moved the Court for an order requiring the Government to produce any prior statements made by the witness, in possession of the United States Attorney. The trial judge declined to order the production of Harris' testimony before the grand jury. This ruling was in error as the Jencks Act permits a defendant to have such access. 18 U.S.C. § 3500 (e) (3). However, after appellant had completed his cross-examination of Harris the United States Attorney advised the Court that defense counsel should be provided with the grant jury minutes. After receiving and examining the grand jury testimony appellant was then permitted to re-cross-examine Harris.

Appellant concedes the difficulty in finding any prejudice resulting from the initial error by the trial judge. In our opinion the error was cured. We hold that no such prejudice exists. Furthermore, we are of the opinion that the curtailment of the re-cross-examination by the Judge, which is charged as error, served only to limit questions that were cumulative, repetitive and irrelevant to the cases being tried. Limitation of the scope of cross-examination is within the sound discretion of the District Judge and

will not be overturned in the absence of abuse. *United States* v. *Marchesani,* 457 F.2d 1291 (6th Cir. 1972); *Poliafico* v. *United States,* 237 F.2d 97 (6th Cir. 1956), *cert. denied,* 352 U.S. 1025 (1957).

We find no abuse of discretion. We conclude that the District Judge permitted a full and fair cross-examination of Harris.

V

Patrolman McClanahan contends that he was denied the effective assistance of counsel when the trial judge refused to grant a continuance of his trial. On the morning of his trial the Judge informed McClanahan's recently retained counsel that he would not be permitted to represent McClanahan because of a "possible conflict" with the State Bar of Kentucky. Another attorney, Ralph Crisci, had been contacted on the preceding Friday in expectation of this occurrence. Crisci appeared that morning in the District Court and had his first opportunity to confer with McClanahan for thirty minutes. Crisci then requested a continuance of the trial so that he could familiarize himself more fully with the case. That request was denied and the trial of the case began that morning.

The ruling on a motion for a continuance is within the sound discretion of the District Court and will not be overturned absent a showing that the ruling constituted an abuse of discretion. *United States* v. *Ploeger,* 428 F.2d 1204 (6th Cir. 1970). Such an abuse of discretion would exist if McClanahan were denied his Sixth Amendment right to the effective assistance of counsel. An analysis of all the facts and circumstances of this case is necessary in order to determine whether McClanahan was denied that

right. *United States* v. *Knight,* 443 F.2d 174 (6th Cir. 1971).

McClanahan was originally represented by Attorneys Charles Schear and Mott Plummer. On October 21, 1974 Plummer filed a motion for both attorneys to withdraw as counsel, stating that Schear was ill and could not participate; that he [Plummer] had filed numerous motions and had attended hearings on those motions; that they would not be able to represent McClanahan and he requested the Court to remove their names as counsel; he stated that McClanahan "did not want a continuance and that he was seeking and had other counsel." The Court granted the motion.

Several of the attorneys whom McClanahan approached had schedule conflicts and thus were unable to represent him. McClanahan also attempted to retain the attorney representing defendant Faulkner; however, Faulkner's counsel declined to take McClanahan's case because of a possible conflict of interest between the two defendants. McClanahan then retained Attorney Barry Wehrman who immediately sought a continuance because of a schedule conflict; his motion was denied. Finally, McClanahan contracted Burton Signer who agreed to represent him; however, Signer was disqualified on the morning of trial, and Crisci, who was contacted on the preceding Friday, took over the case.

No absolute rule can be articulated as to the minimum amount of time required for an adequate preparation for trial of a criminal case. Thus we look for a showing from the defendant of prejudice, *i.e.*, a showing that the continuance would have made relevant witnesses available, or would have added something to the defense. *United States* v. *Moore,* 419 F.2d 810 (6th Cir. 1969); *United*

States v. *Sisk*, 411 F.2d 1192 (6th Cir. 1969), *cert, denied*, 396 U.S. 1018 (1970); *United States* v. *Decker*, 304 F.2d 702 (6th Cir. 1962).

McClanahan was unable to make any showing of prejudice as a result of his late employment of counsel. Our examination of the record and the facts and circumstances of this case in their totality leads us to the conclusion that McClanahan's counsel had more than an adequate amount of time for preparation.

First, we note that the issues in this extortion case were relatively uncomplicated. Further, during most of the pretrial proceedings McClanahan was represented by his original counsel; none of his rights was jeopardized by any lack of assistance prior to the commencement of the trial. Furthermore, the trial lasted nearly one month and there were several adjournments; thus Crisci had many opportunities to consult not only with his client and with McClanahan's prior counsel, but also with counsel for the other defendants. Although the trial began on November 13th, the first witnesses did not take the stand until November 15th; indeed, the important prosecution witness, Samuel Harris, did not take the stand until November 18th. Crisci did not present McClanahan's case until December 3d.

Crisci actively participated in the trial of the case, conducting a vigorous defense, cross-examining Government witnesses, making motion to suppress and dismiss indictment counts, to suppress tapes, and for a recess to study grand jury transcripts; he objected to testimony, and moved for judgment of acquittal. We conclude that there was sufficient time for Crisci to prepare adequately to defend his client. McClanahan's defense was in able hands.

The District Judge refused to grant a continuance because he felt that McClanahan was "temporizing the Court." (A. XIV at 1139). Given this consideration and the fact that McClanahan was able to demonstrate no prejudice resulting to him, we conclude on the facts and circumstances of this case that the District Judge did not abuse his discretion in refusing to grant the continuance. We find no prejudicial error in the record. The judgment of conviction was supported by substantial evidence.

The judgment of the District Court is affirmed.

Nos. 75-1778, -1779, -1780

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1778

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD D. FAULKNER,
Defendant-Appellant.

No. 75-1779

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM E. WELLS,
Defendant-Appellant.

No. 75-1780

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JERRY McCLANAHAN,
Defendant-Appellant.

ORDER

(Filed August 13, 1976)

Before WEICK, PECK and LIVELY, Circuit Judges.

No active judge of this Court having requested that a vote be taken on the suggestions for an en banc hearing on the petitions for rehearing, said petitions were considered by the panel and found not to be well taken.

IT IS THEREFORE ORDERED that the said petitions for rehearing and each of them is hereby denied.

ENTERED BY ORDER OF THE COURT.

John P. Hehman, Clerk
By /s/ GRACE KELLER
Grace Keller, Chief Deputy

LETTERHEAD OF
United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF KENTUCKY
LEXINGTON, KENTUCKY 40501

October 11, 1974

Hon. James L. Cobb, Jr.
Cobb, Combs, Beasley & Oldfield
211 East Fourth Street
Covington, Kentucky 41011

Re: U.S. v. Donald Faulkner, et al.
Covington No. 74-29

Dear Mr. Cobb:

In accordance with your letter of September 6, 1974, I am enclosing a copy of the transcript of the tapes concerning the indictment against your client, Donald Faulkner, and Red Wells and Jerry McClanahan. By a copy of this letter I am also sending copies of this transcript to the other attorneys involved. Please pardon my delay in sending this to you.

Sincerely,

Eugene E. Siler, Jr.
United States Attorney

EES/nb

Enclosure

cc: Hon. Charles J. Schear (with encl.)
Hon. B. H. Berg (with encl.)

TRANSCRIPT OF RECORDINGS

(Selected portions used in direct and cross examinations)

The following is a verbatim transcription of that conversation:

Patrolman GERALD McCLANAHAN – What happened to your landlady up there?

HARRIS – Up where?

McCLANAHAN – She split. She's not gonna come.

HARRIS – Beats me. (Unintelligible)

McCLANAHAN – I have to get to the, I have to get to them cases. I don't know if your lock pullers are there or not.

HARRIS – Well the only thing I'm . . . (unintelligible)

Patrolman GERALD McCLANAHAN – Mousetrap might have a few.

SAMUEL D. HARRIS – The Mousetrap pretty crowded?

McCLANAHAN – I haven't been in there but they got a lot of cars outside.

HARRIS – (unintelligible)

McCLANAHAN – Leroy coming around?

HARRIS – I don't know. Did he get out of jail?

McCLANAHAN – Yeah, he finally got out.

HARRIS – We give him a little bit. We give him 60 bucks. Can you walk out in the parking lot without this guy coming with you? I don't like to talk too much in there (unintelligible) . . . a lot of agents in here . . . (unintelligible) . . . in the bank.

McCLANAHAN – I will be back in a minute, Gene. Did that guy tear up your car when he swung with it?

HARRIS – Yeah, ah, just a few, few a minor things.

McCLANAHAN – A lot of agents in here?

HARRIS – Yeah, there's three back there. I, a, I'm

going to, you know, that 400. I'm gonna, going to give it to you a little at a time, as much as I, uh, can steal . . . (unintelligible)

McCLANAHAN – That's all right, that's what I tried to tell you is best even though Gene wasn't there. Once you get rid of it that's the main thing.

HARRIS – Ain't nobody out here is there. I got $25.00 tonight. I don't know, uh, see I'd like to get those tools back.

McCLANAHAN – All I can do is get part of them back.

HARRIS – Okay, any, any.

McCLANAHAN – Which one, which one did you use – the one that was marked up is that the one you wanted?

HARRIS – Yea, the LP's. I don't know exactly what all was used but, you know the LP's I know they was used, because we, we screwed the lock up and then couldn't get it back in. You know we, we I know they was used but I don't know what all else, but I didn't get no money out of the job. We had to blow it all. You know we lost it in Iowa, but uh, I'm getting a lot of heat from it. There was a gun collection or something taken off that Faulkner called me about today. I don't know anything about that shit. I am not working in this area you know.

McCLANAHAN – You don't want to do anything around here to get yourself in the middle.

HARRIS – I never get busted in Newport legitimately.

McCLANAHAN – . . . going to ask you. You know I got a pair of LP's that is all marked up . . . (unintelligible)

HARRIS – Okay

McCLANAHAN – The Judge got most of the tools.

HARRIS – Oh, did he?

McCLANAHAN – Yeah.

HARRIS – What the hell would he want them for?

McCLANAHAN – He is remodeling.

HARRIS – Oh, I don't believe that shit. (unintelligible)

McCLANAHAN – Did you ever get word of anyone else being hauled in over it?

HARRIS – (unintelligible)

Unidentified female – Bill.

HARRIS – You working tonight?

WILLIAM E. WELLS – I might be.

HARRIS – Thanks Miss.

WELLS – I gonna have to start drinking again. Orange juice and coke is killing me.

HARRIS – You're right. (unintelligible)

WELLS – No. Ye're off a couple nights. I'll be back in a minute. It's starting to snow.

HARRIS – Is it really. I would like to see it come a snow, if I could get in bed someplace and just sleep.

WELLS – Yeah, and just stay there.

HARRIS – Yeah. I will be back in just a second, I ordered . . . (unintelligible) You know Red's involved. Give me 5 bucks will you?

ARMINA LEE – Why?

HARRIS – I need it.

LEE – You bring me back one cold White Castle and one cup of coffee and tell me you ain't got no money left to give to Jerry Early or Jerry McClanahan, $50 dollars.

HARRIS – Never mind. Huh?

LEE – Hand me the case out of there.

HARRIS – What case? Huh . . . (unintelligible)

LEE – Put that back in there.

HARRIS – I am in a bind, right, I got to pay him.

LEE – Okay.

(unintelligible) . . . (long pause) (PA system in background)

HARRIS – (unintelligible) walk outside . . . nothing around. (unintelligible)

HARRIS – I've been doing okay, you know, this week. I had a few pay outs you know.

WELLS – What do you mean, on the joint here?

HARRIS – Yeah.

HARRIS – I, ah, I know somebody up there. I want to take care of you, you know. Like we talked about this thing before but, uh, it is limited you know, what I can do.

WELLS – I know that.

HARRIS – Like uh, door money that's all I have control of. I can't, uh, get in any of the big money. Hell I can't, uh, control any big money, you know.

WELLS – Don't worry 'bout it.

HARRIS – 15,25.

WELLS – Okay.

HARRIS – I guess, uh, Mina will probably be taking care of more of y'all next, in a week. You know she mentioned it to me.

WELLS – What do you mean? Uh, on the other guys?

HARRIS – Yeah.

WELLS – I had better get in, it is getting cold.

HARRIS – She is really tight you know.

WELLS – Hell don't worry about it, (unintelligible) Christmas and that. Fuck I, I don't go around bothering other joints.

HARRIS – I know, I just want the heat kept off this place as much as possible. I was really getting racked there for a while boy, every way, shape and form.

FELLS – I'll just tell Schoepf that Mina's gonna take care of everybody.

HARRIS – Okay

WELLS – Okay?

HARRIS – Yeah, fine.

HARRIS – I'm gonna, I'm gonna get something (unintelligible) . . . Just watch what you do in here, you know.

WELLS – Oh yeah.

HARRIS – Because uh . . .

WELLS – I do not even talk loud in here . . .

HARRIS – (laugh) I ain't worried about the girls.

HARRIS – This might be on there cause she starting cussing. Fuck them cops. Oh shit.

FAULKNER – Huh?

HARRIS – I keep six or seven thousand in the bank, half for a lawyer and half to spend when it gets down to five . . .

FAULKNER – . . . a little bond money.

HARRIS – Yeas, when it gets down to five I go on the road and gets back up to seven, I lay in, and it gets down to five I go on the road.

FAULKNER – (unintelligible)

HARRIS – Uh, Wells is here again tonight. He must want greased, huh? Him and that fuckin' McClanahan, boy, them mother fuckers are always are hungry.

Unidentified Male Number 1 – Boy, that was the pause that refreshed.

Unidentified Male Number 2 – Hey, Ed, (laughter)

FAULKNER – Hey, we'll see you later.

HARRIS – Okay, you be, guys be cool.

FAULKNER – What time you, what time you want me to call you tomorrow.

HARRIS – 'Bout noon.

FAULKNER – Huh?

HARRIS – Noon. That'll give me time to get a few hours sleep. Bot the number out there?

FAULKNER – (unintelligible) . . . I got it somewhere.

HARRIS – 2-9-1-0-3-5-4 (music in background).

FAULKNER – See you tomorrow.

HARRIS – Okay, yeah, goodnight. (music continues) (pause) Cocksuckers are hungry, aren't they? Dog mother fuckers. Think I'm gonna go and, get something to eat. (music continues)

END OF CONVERSATION

BEGIN NEW CONVERSATION

SAMUEL D. HARRIS – Getting ready to leave?

WILLIAM E. WELLS – Yeah.

HARRIS – I'll walk you out. Gosh, fuck, oh. Trying to take care of business, is a struggle. Trying to take care of all this bullshit. Here, here, uh, here's uh, twenty-five um, I guess, uh, she's uh, taking care of the rest of them.

WELLS – You know you give me twenty-five the other night, now.

HARRIS – Well, well, here was the list that she give me.

WELLS – Oh, that was from you though, the other night.

HARRIS – Yeah.

WELLS – Yeah, Schoepf's in there.

HARRIS – Yeah.

WELLS – Terry Gugel! There's some of these cocksuckers I wouldn't give nothing to . . . (unintelligible)

HARRIS – Yeah.

WELLS – They ain't gonna tell you what to do.

HARRIS – Well, this is, uh, what she said. I just go by what she says.

WELLS – What's new, anything?

HARRIS – Naw, nothing at all. Terry Gugel, he's the mother fucker that raises all the hell all the time.

WELLS – I wouldn't give some of them mother fuckers nothing. 'Course that's . . .

HARRIS – Well, hell, he's the Chief's son, he might raise hell. He said he's gonna close the place.

WELLS – Said he's gonna close this one?

HARRIS – Yeak, fuck, he's closing everything. I just wish he'd close his fuckin' mouth. Goddamn. It's too cold out here man, I got to go. I'll see ya . . .

WELLS – Yeah, Schoepf's still there anyway. I gotta get Schoepf.

HARRIS – Okay, uh, uh, she's gonnta take care of some tomorrow night too, so I don't know. Brrrr.

(unintelligible)

Below is a verbatim transcription of the tape containing conversations obtained on the night of December 22-23, 1973.

In addition to the conversations set out below, it is noted that there was background noise, music, etc., that was not transcribed.

SAMUEL D. HARRIS – (unintelligible) . . . four years. (pause) Where'd Mino go?

Unidentified female – I don't know. In the back room.

HARRIS – Tell here . . . (unintelligible) tell her (unintelligible) will ya.

HARRIS – Worth a coupla hundred. I looked at it already. Aaaah, What'd you do? Uhhh, break it down?

ARMINA LEE – Huh?

HARRIS – What'd you do?

LEE – I got this off a friend. What do you think it's worth?

HARRIS – Couple hundred.

LEE – A new one . . . (unintelligible)

HARRIS – Beats me.

LEE – Really, think that's all it's worth?

BESS RALEIGH – Huh?

LEE – (unintelligible)

RALEIGH – You know, uh, I, wholesale, I don't, don't know enough about this retail shit. But the one I got Mina, I wouldn't pay him 500 for it. (unintelligible)

HARRIS – Boy, I hate giving those guys this money. 'Specially that Gugel and them . . . (unintelligible). Just raises hell, threatens to close people up and (unintelligible).

(Background noises, laughing, talking, etc.)

HARRIS – What are they gonna do? Have a party after this, this closes.

TOMMY CHAMBERS – I don't know.

HARRIS – I'm going home. I don't give a fuck what's going on. (unintelligible) (pause) . . . Huh?

TOMMY CHAMBERS – (unintelligible) cute little out, outfit (unintelligible)

TRANSCRIPT REFERENCES

Trans., Vol. 8, p. 614 – (Witness Jenkins testifying):

"Mr. Berg: (interposing) Now at this time, if Your Honor pleases, I would like the record to show that there is an objection to this testimony. There is nothing in these indictments to indicate that these payments were made to this defendant. I would ask - - -."

Trans., Vol. 8, p. 17:

"The Witness: I was in business at the time in the New Plaza Lounge". (A bar not mentioned in the indictment). "He was there to protect Sam, Sammy Wright's interests or rights, and Mary Dell was making accusation that I was stealing money from them and all this, and that's why I asked 'Red' (Petitioner Wells) for protection, because I was still operating the New Plaza Lounge."

"The Court: I will overrule your objection."